In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 33.

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE DOLLAR SAVINGS & TRUST CO. OF YOUNGSTOWN, OHIO, GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.

BRIEF OF RESPONDENT, EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF JOHN ORAVITZ, DECEASED.

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The Circuit Court of Appeals for the Sixth Circuit affirmed a judgment of the U. S. District Court for the Northern District of Ohio, Eastern Division, declaring an attachment lien, duly perfected in a State court action for wrongful death and resulting in judgment therein, to be superior to a lien for income taxes filed subsequent to the attachment, the District Court following the Ohio law that such attachment is an "execution in advance" under the Ohio statutes and superior to liens subsequently filed.

STATEMENT OF FACTS.

On February 17, 1947, Michael P. Acri shot and killed John Oravec while the latter was partaking of refreshments at the Acri Tavern. Found guilty of murder, he was sentenced to a life term at the Ohio State Penitentiary.

Surviving are Oravec's parents, of whom he was the sole support.

Acri and his wife were possessed of considerable property; but the most liquid assets were cash savings and Government bonds contained in a safe-deposit box at the vault of the Dollar Savings and Trust Company in the name of Acri, discovered by Mr. John Willo, Counsel for the administrator of the Oravec estate.

On **August 6th, 1947**, suit for wrongful death was filed in the Court of Common Pleas of Mahoning County, and on the same day an attachment of the funds and securities at the Dollar Savings and Trust Co. was issued and service had on garnishee.

On **January 19, 1949**, on trial before Judge Doyle, judgment in the sum of $18,500 was rendered in favor of the administrator suing on behalf of Oravec's parents. The journal entry reads in part:

> "The Court further finds that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Co. of Youngstown, Ohio: that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947, and for the full payment and satisfaction of the judgment entered herein."

Subsequent to the attachment for wrongful death on **August 6th, 1947**, the Commissioner for Internal Revenue had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector of Internal Revenue, and Demand for Payment was mailed to Acri on **November 11, 1947.**

On **November 21, 1947**, a tax lien was filed in the office of Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served upon The Dollar Savings & Trust Company.

On **June 14, 1948**, The Dollar Savings & Trust Company was appointed guardian of the estate of Michael P. Acri, who had been incarcerated upon his conviction for the murder of Oravec.

ARGUMENT.

Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and recorded subsequently to the date of the attachment lien.

NATURE OF ATTACHMENT LIEN UNDER OHIO STATUTES.

The nature of an attachment has been stated to be a "direct appropriation by authority of law of specific property of the debtor, for the purpose of satisfying the demand, and the *lien thereby created is substantial and enduring, as much as a mortgage or pledge.*" 5 *Am. Jur.* p. 87, Sec. 815.

The Ohio General Code, section 11837 (R. C. 2715.19) provides:

> "An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice."

The absoluteness of an attachment lien under the Ohio statute, as distinguished from being a mere inchoate

right to lien or *lis pendens*, is stated by the Ohio Supreme Court in *Rempe v. Ravens*, 68 O. S. 113 at 128:

> "The writ of attachment or garnishment is in the nature of an 'execution in advance' and the office and purpose of such writ is to hold and bind the property seized until final judgment in the attachment proceeding, and if upon final hearing in the attachment suit judgment is rendered in favor of the plaintiff, the effect of such judgment is to give plaintiff the right to enforce any lien he shall have acquired by his attachment or garnishment against whatever interest the defendant may have in the property attached or garnished."

The opinion of Justice Minton in *United States v. Security Trust* (1950), 340 U. S. 47, 95 L. Ed. 53, founded on the California statute and the decisions construing it, does not harmonize with the laws of Ohio. There is no decision in Ohio which holds an attachment lien to be only a contingent or inchoate right, a mere *lis pendens*, which gives it no priority over a subsequent lien. An attachment in Ohio is considered a proceeding in rem, the lien whereof prevails over subsequent liens unless released or the main action dismissed. *Pilgrim Distributing Corp. v. Galsworthy*, 148 O. S. 567; *St. John v. Parson*, 54 O. App. 420; *Oil Well Supply Co. v. Koen*, 64 O. S. 568. "The attaching creditor acquires from the levy a right to have the property held by the attaching officer, and under subsequent order, a right to have the property sold." 4 *O. Jur.* p. 201, sec. 158.

When an order of attachment is issued and executed by seizure, the levy gives rise to a lien. The General Code of Ohio, Sec. 11837 (R. C. 2715.19), specifically provides that "an order of attachment shall bind the property attached from the time of service." *Liebman v. Ashbaker*, 36 O. S. 94; *McCombs v. Howard*, 18 O. S. 422. "The lien

of the attachment does not depend upon the sufficiency of the affidavit, but upon the taking of the property under the writ." *Benedict v. Peters*, 58 O. S. 527 at 536; 4 *O. Jur.* p. 202, sec. 159.

The procedure of determining priorities in attachment cases is provided by Sec. 11858, G. C. (R. C. 2715.40) of Ohio. A trial of the claimant's right to the property can be had only at the instance of such claimant. 4 *O. Jur.* p. 250, sec. 192. Section 11859 G. C. (R. C. 2715.41) of Ohio further provides:

> "When several attachments are executed on the same property, or the same person is made garnishee by several parties, on motion of any of the plaintiffs the court may order a reference to ascertain and report the amounts and priorities of the several attachments."

NO INCHOACY OF LIEN UNDER OHIO STATUTES.

Counsel for the Government attempt in their brief to foist on this honorable court the wrong concept that an attachment in Ohio creates no lien on the property attached, and is merely a caveat or *lis pendens* as regarded by the courts of California under the California statute and followed by Mr. Justice Minton in the *Security Trust* case, 340 U. S., 47. The Government in its brief states:

> "It is clear that an attachment under Ohio law does not give to plaintiff a choate lien—that it is a mere *lis pendens* notice that a right to perfect a lien exists."

We wish here to emphasize that this statement of the Ohio law is wholly inaccurate, and that there is no such thing in that state as an inchoate attachment lien; nor is there any similarity in the decisions of Ohio and California as to the nature of such lien under the statutes of these respective states.

Equally so is the smear on the state judge on page 7 of the Government's brief—a man known for his fairness and integrity—that the damages awarded for the wrongful death of the young man killed by Acri were speculative and conjectural.

An attachment lien validly obtained under the Ohio law creates a property right which cannot be displaced by subsequent liens. A levy in that state under an order of attachment or garnishment confers upon the attaching creditor a lien with respect to the property attached which will prevail over all subsequent liens. The rule prevailing in Ohio is stated in the 1954 edition of *Ohio Jurisprudence*, Vol. 5, p. 663, Sec. 316:

> "Contests between attachment, and other rights, titles, or encumbrances, are determined as a general rule by priority in time by applying the maxim 'qui prior est tempore potior est jure.' The priority of an *attachment lien* depends not when the order of attachment is made but at the time of service * * *. It is a general rule that the *attachment lien* is superior to all subsequent rights, titles, and encumbrances." (Emphasis added.)

It is on this principle that the district court judge, in the case at bar, rested his opinion (109 Fed. Supp. 943), which was affirmed by the Circuit Court of Appeals (209 Fed. (2) 258).

From the earliest time, as well as currently, the provisional remedy of attachment is regarded by the courts of Ohio in the nature of an 'execution in advance." *James Ward & Co. v. Howard* (1861), 12 O S., 158; *Rempe v. Ravens* (1903), 68 Ohio St., 113, at 128; *Green v. Coit* (1909), 81 Ohio St., 280, at 285. In the latter case the Supreme Court of Ohio stated:

> "Attachment is an extraordinary remedy; it is in the nature of an execution before judgment; by

> means of it the rights of a party may be determined without service of process upon him and even without his knowledge; it is intended to create *a lien* on the property of the defendant, authorized only by statute." (Emphasis added.)

As to the nature of the right acquired by an attaching creditor under the statutes of Ohio, the text in *Ohio Jurisprudence*, 1954 edition, Vol. 5, pp. 657, 658, further states:

> "Garnishment renders the garnishee 'liable' to the attachment plaintiff. By service of garnishee process the attachment plaintiff acquires a right in respect to property or credits of the defendant which are in the hands of the garnishee. *This right is generally regarded as in the nature of a lien* upon the title or right of action of the defendant. Garnishment holds the garnishee to a personal liability and gives the attaching creditor a *lien* on a debt so far as to restrain the garnishee from paying it over to the original debtor. * * * A garnishing creditor acquires such an interest in the property subject to the garnishment that where such is the subject of litigation in another court the creditor is entitled to intervene to protect his interest. The *lien* or right which the attaching creditor acquires by garnishment extends to all property of the defendant in the hands of the garnishee and to money and credits due from him to the defendant."

It has been further held that the legal effect of a garnishment order in an attachment proceedings, where judgment is rendered for the plaintiff, is to transfer the indebtedness of the garnishee to the plaintiff in the attachment so far as the same may be necessary to satisfy his judgment, with the right to foreclose mortgages seized under the garnishment order, in the same manner as if acquired by an assignment. *Alsdorf v. Reed*, 45 Ohio St., 653.

INAPPLICABILITY OF CALIFORNIA LAW.

The California attachment statute differs materially from the one in Ohio and the decisions interpreting the former have no application to the latter. The California Code of Civil Procedure, section 537, subjects the property attached "as security for the satisfaction of any judgment that may be recovered," whereas the Ohio statute, G. C. 11837 (R. C. 2715.19), provides that "an order of attachment shall bind the property attached from the time of service." No lien is expressly provided by the California statute when the property attached is personal property, although a lien is provided by section 542a when the attachment is on real property, upon the recording of a copy of the writ together with a description of the property attached. As to attachments on personal property, section 542b provides:

> "An attachment or garnishment of personal property * * * shall cease to be of any force and effect and the property levied on be released from the attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made."

Construing the California statute in an attachment on real property, in the case of *United States v. Securities Trust and Savings Bank, etc.*, 340 U. S. 47, 95 L. Ed. 53, Mr. Justice Minton stated:

> "The attachment lien gives the attachment creditor no right to proceed against the property unless he gets judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded * * *. He had a mere caveat of a more perfect lien to come."

Inasmuch as the Government depends upon the decision of the above cited California case, we believe it will aid the Court for us, at this time, to quote further from Mr. Justice Minton's decision:

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' *Illinois vs. Campbell*, 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissequr vs. Yarbrough*, 29 Calif. 2d 409, 412, by stating that 'the attaching creditor obtains only a potential right or a contingent lien.' Examination of the California statute shows that the above is an apt description. * * *"

PRIORITY OF ATTACHMENT LIEN.

The rule that a lien prior in time is prior in right has been consistently followed by this honorable court since the time of the immortal Marshall. In *Rankin v. Scott*, 25 U. S. 177, 12 Wheaton 177 at 179, Chief Justice Marshall stated:

> "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Mr. Justice Minton, following this pronouncement in the recent case of *United States v. New Britain*, 347 U. S. 81, said:

> "This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 American Jurisprudence, Liens, Sec. 33; 53 C. J. S., Liens, Sec. 106. We think that Congress had this cardinal rule in mind when it enacted Sec. 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

The principle applies equally to the attachment plaintiff here, who perfected his lien on specific property long before the Government knew it had any claim against the owner of the attached property, and long before it had commenced proceedings to assert its lien under the provisions of the Internal Revenue Act.

The cases cited by opposing counsel on priority of "debts due the United States" have no application. Such priority must rest on the debtor's insolvency and must relate to property belonging to his estate. "If, therefore, before the preference has accrued to the United States the debtor has made a bon fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, *or if his property has been seized under a fi.* fa., the property is divested out of the debtor and cannot be made liable to the United States." *United States v. Knott,* 298 U. S., 544, at 549, Opinion by Brandeis, *J.*

In *Illinois v. Campbell,* 329 U. S. 362, 91 L. Ed. 348, this honorable court held that it would follow the decisions of state courts on the question of inchoacy of lien, but intimated that it would not accord priority to a claim of the United States for taxes over a lien asserted against the assets of an insolvent debtor which is definite as respects the identity of the lienor, the amount of the lien, and the property to which it attaches. All these prerequisites were present as far as the attachment lien here is concerned.

The holder of a mechanic's lien was held in the Taylorcraft case, *U. S. v. Martin Fireproofing Corp.* (C. C. Ohio 1948), 168 Fed (2) 808, to have priority over a subsequent income tax lien. See also *Re Carswell Construction Co.*, 13 Fed. (2) 667. Other decisions are of similar effect and similarly give an attachment lien, perfected prior to the filing of an income tax lien, priority over the latter; *Louisiana State University v. Hart* (1946), 210 La. 78, 174 A. L. R. 1366; *United States v. Yates* (Tex. 1947), 204 S. W. (2) 399. These cases, distinguishing the *Mackenzie* case (C. C. 9, Cal.) 109 Fed. (2) 540, proceed upon the theory that the nature of the rights flowing from an attachment must be determined by the *law of the state. Spokane County v. United States,* 279 U. S. 80, 73 L. Ed. 621; *United States v. Waddill,* 323 U. S. 353, 89 L. Ed. 294; *New Orleans v. Harrell,* 134 Fed. (2) 399; *United States v. Texas,* 314 U. S. 480, 86 L. Ed. 356, cited in *Louisiana University* case, *supra. The same rule was applied to liens under Sec. 3466* (U. S. C. Sec. 191, Title 31) *for "debts due to the United States." United States v. Canal Bank* (C. C. Me.), 3 Story 79, Fed. Cas. No. 14,715; *U. S. v. Collins* (C. C. N. Y.), Fed. Cas. No. 14,834; *U. S. v. Mechanics Bank* (D. C. Pa.), Fed. Cas. No. 15,756; *Hopkins vs. Duffy* (Pa.), 9 Lanc. Bar 125; *United States v. Acres* (Mo. 1947), 73 Fed. Sup. 820.

It was also ruled by the Attorney General (1823), 1 *Op. A. G.* 616, that the priority of the United States cannot reach back over any valid lien, whether it be general or specific.

In the instant case *there is no lack of specificity in the lien perfected by the attachment; the moneys and securities have been specifically levied on and the attachment lien affected as provided by statute, before the Government has taken any steps to assert its lien.*

PRIORITY OF "DEBT DUE UNITED STATES."

Section 3466 of the Revised Statutes, 31 U. S. C. A. sec. 191, provides that all debts owed to the government shall have a prior right to being paid first. This statute is wholly inapplicable, because at the time we obtained our levy under the attachment there was no debt due the United States for income taxes, nor lien effected therefor under the provisions of the Internal Revenue Act, sections 3670, 3671 and 3672, 26 U. S. C. A. No priority or lien for the tax could be claimed until the collector of internal revenue has received the assessment list, made demand for payment upon the taxpayer, and filed the notice of lien at the office of the county recorder. In our case all of this statutory procedure was subsequent to the attachment and therefore no debt or lien existed in favor of the government at the time our attachment was perfected.

Furthermore, the priority provided by section 3466 applies only to insolvency cases. It has been held that this section does not give priority to a tax claim, or creates a lien in favor of the Government, in the absence of insolvency of the taxpayer. *Winston-Salem v. Powell Paving Co.* (1937), 7 Fed. Supp. 424; *Bishop v. Black* (1951), 64 S. E. (2) 167; *Re Rowe Bros.*, 18 Fed. (2) 658; *Tidestly Coal Co. v. American Fuel Corp.* (1947), 130 W. Va. 720, 45 S. E. (2) 750; *U. S. v. Fisher*, 2 Cranch. 358, 2 L. Ed. 304, opinion by Marshall, *C.J.* See also 6 *Am. Jur.* p. 873, sec. 548, and cases in Annotation 83 L. Ed. 1239, where liens obtained by execution levies were held superior to the claim of the United States for income taxes. In Ohio, as previously shown, an attachment is treated as an execution in advance.

OPERATIVE EFFECT OF ATTACHMENT LIEN.

It is well recognized in the great majority of jurisdictions that an attachment properly obtained either by seizure or garnishment proceedings creates a specific lien which operates on the property concerned from the date of service of the writ of attachment. 7 *Corpus Juris Secundum*, Sections 254, 255, p. 430 *et seq.*; 5 *American Jurisprudence*, Section 825, p. 93. In Ohio this rule clearly prevails by force of the provisions of Ohio General Code Section 11837 (R. C. 2715.19) that "*an order of attachment shall bind the property attached from the time of service.*"

This statutory rule was recognized and reiterated in *Ohio Auxiliary Fire Alarm Co. v. Heisley* (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691, wherein the first syllabus provides in part:

> "The service of a writ of garnishment upon a party claimed to be indebted to the defendant binds in his hands the property he may have belonging to the defendant at the time he is served with the writ."

And in *Malkey v. Ruggles* (1923), 24 O. N. P. (N. S.) 433, 434, it was stated that "under the provisions of General Code an attachment is a lien from the time of seizure."

The Supreme Court of Ohio at a very early date announced the rule that contests involving priorities between attachment and other lien claims were to be determined by application of the maxim, "qui prior est tempore potior est jure." *Shorten v. Drake* (1882), 38 Ohio St. 76. It was followed by Justice Minton in the *New Britain* case, 347 U. S. 81. This priority of time rule has been applied in holding an attachment lien to be superior to a subsequently issued execution. *Malkey v. Ruggles*, 24 O. N. P. (N. S.), 433. It has also been held that an attachment

lien is superior to an unrecorded mortgage. *Wright, et al. v. Franklin Bank, et al.*, 59 Ohio St. 80.

From the foregoing it appears indisputable that the attachment lien of the administrator is superior to the general lien of the United States for income taxes in the instant matter, since the attachment lien was obtained some three months before the Collector of Internal Revenue either received the assessment lists, demanded payment of delinquent taxes from Acri, or filed the applicable Notice of Tax Lien. This concept has been applied in the following decisions which concern the precise question presented herein.

In the case of *Louisiana State University vs. Hart*, (Louisiana Supreme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, the University brought suit for $75,000 on an alleged overpayment for furniture purchased from one Smith. The suit was filed on July 25, 1939, and a writ of attachment was issued the same day.

On February 13, 1940, the United States Commissioner assessed income taxes, penalties and interest in the amount of some $305,000 against Smith for the years 1936, 1937 and 1938. On February 15, 1940, the Collector of Internal Revenue received the Commissioner's assessment list and on the following day filed proper notices of tax liens. Subsequent to this time the University recovered judgment in the amount of $25,000 against Smith.

In the suit which ensued on the question of the priority of the University's lien over that of the Government's for income taxes, the Court held as follows in the fourth syllabus of the A. L. R. report:

> "A federal tax lien for income taxes and penalties arising between the date of attachment of the tax debtor's property and the date of judgment, which maintained it, is subordinate to the lien resulting from

> the attachment, and the attaching creditor is to be preferred to the United States in the disposition of the proceeds of the property seized under the writ of attachment."

In the case of *United States v. Yates* (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399, the plaintiff, Yates, brought an action to recover judgment against one Russell, for amounts due for rent of equipment and labor on a construction job. The United States intervened, claiming prior liens on the basis of Russell's delinquent taxes. The facts reported disclosed that Yates perfected an attachment lien on May 15, 1944, while the Government did not file its Notice of Tax Lien until May 26, 1944. The Court, in affirming judgment for Yates on his attachment lien, held in the second syllabus:

> "A specific attachment lien, levied on airport construction contractor's property before date on which Federal Government fixed its tax lien on proceeds of sale of attached property, was entitled to priority over government's lien, though attaching creditor's claims were not reduced to judgment."

In this regard it will be noted that in *Louisiana State University v. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, *supra*, the Court at page 1370, A. L. R. report, said:

> "The United States relies on the case of *Mackenzie v. United States*, 109 F. (2d) 540, but a reference to that case shows that the lien of the government arose prior to the issuance of the attachment, while in this case it arose subsequent to the attachment."

And in *United States v. Yates*, 204 S. W. (2d) 399, *supra*, the same distinguishing factor is both apparent and was noted by the court.

STATUTE CANNOT BE CONSTRUED TO DISPLACE VALID SUBSISTING LIENS.

We have shown that an attachment lien is a property right, in the nature of a mortgage or pledge (5 *Am. Jur.*, p. 87, Sec. 815) and so regarded by the Ohio decisions. Congress never intended to displace valid prior liens by liens for income taxes subsequently obtained. The provision of Section 3670 of the Internal Revenue Code, that the indebtedness for an income tax "shall be a lien in favor of the United States upon all property and rights to property belonging to such person," could under no circumstances be construed as to embrace property which had been legally aliened or encumbered by the taxpayer, and no longer belonging to him except subject to the vested rights acquired therein by bona fide lienholders. *United States v. Knott*, 298 U. S., 544, at 549. To hold otherwise would be violative of the due process clause and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

Accordingly it is generally recognized, that an act of the legislature which postpones an existing valid lien and makes a subsequently created lien superior thereto is a law impairing vested property rights. See 12 *Am. Jur.*, p. 86, Sec. 443.

Thus it was held that the right of creditors holding secured obligations to retain their lien until the obligation is paid is a substantive property right, and depriving creditors of such right is violative of those constitutional guarantees. *Security First National Bank v. Rindge Land and Navigation Co.*, 85 Fed. (2) 557, 107 A. L. R., 1240, certiorari denied 299 U. S. 613, 300 U. S. 686. Similarly, a statute which makes assessments for workmen's compensation a lien superior to the lien of a mortgage. *Dome-*

nech v. Lee, 66 Fed. (2) 31, certiorari dismissed 290 U. S. 708; or a statute giving mining materialmen a lien superior to a prior mortgage lien. *Crowther v. Fidelity Insurance Co.*, 85 Fed. 41. And as stated in 16 *C. J. S.*, p. 87, Sec. 815:

> "Lien rights constitute property rights of which the lienor cannot be deprived without due process of law. Hence, any newly created lien, if given preference over other liens vested or in existence, constitutes a violation of the due process guaranty."

FEDERAL COURTS FOLLOW STATE LAW IN ATTACHMENT CASES.

It has been repeatedly held that Federal courts will follow decisions of state courts on questions of general common law or commercial law: *Erie R. R. v. Tompkins*, 304 U. S. 64, 84 L. Ed. 1188, overruling *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; that they will follow decisions of intermediate appellate courts which the Supreme Court refused to review: *West v. American Telephone Co.*, 311 U. S. 538, 85 L. Ed. 139, 132 A. L. R. 956, 19 O. Op. 77; that they must apply state law as of the time judgment is rendered; *Vandenbark v. Glass Co.*, 311 U. S. 538, 85 L. Ed. 327; that in controversies involving liens the Federal court enforces the state law. *Re ROCO HOMES* (1942) 23 O. Op. 516; *Gustin v. Sunlife Assn.* (C. C. A. 6th) 154 Fed. (2) 921; 11 *O. Jur.*, p. 136, sec. 782 and supplement.

The rule that Federal courts follow the state law in attachment and garnishment proceedings was followed in the recent cases of *Bernstein v. Heyghen Ferres Societe* (C. C. A. 2 1947), 163 Fed. (2) 246; *Met-Woods Products v. Sparks-Withington Corp.* (D.C. Mich. 1947), 74 Fed. Supp. 979. Rule 64, U. S. C. A. Title 28, replacing former section 726, *specifically requires Federal courts to adopt*

the state law in attachment and garnishment cases, "in the manner provided by the law of the state in which the district court is held."

PRE-EMPTION OF JURISDICTION BY STATE COURT.

There is a rule of pre-emption governing cases in which the State and Federal Courts have concurrent jurisdiction, stated in 14 *O. Jur.* p. 444, sec. 249, and supported by numerous authorities:

> "The general rule that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail applies in the case of Federal and state courts of concurrent jurisdiction, so that whichever court first obtains jurisdiction may retain it for the purpose of deciding every question in the cause. The Federal judiciary has no control over questions, when once the state courts have acquired jurisdiction, until the state has finally exhausted its judicial power over them by a final decision in its highest tribunal."

As to property in legal custody, it is there further stated, sec. 251:

> "The general rule that when a court has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has the right to interfere with and change that possession applies in proceedings where such *jurisdiction is first acquired* in either a Federal court or a state court. Property in possession of one court is not liable to seizure on process from another court. * * * Where one of the courts has thus secured possession or dominion of specific property, the suit in the coordinate jurisdiction to affect the same property should be stayed until the proceedings in the court which first obtained jurisdiction are concluded or until ample time for their termination has elapsed."

See *Molton v. Missouri*, 295 U. S. 97, 79 L. Ed. 1327 (State action prevailing over seizure for Federal taxes); *Princess Lida v. Thompson*, 305 U. S. 456, 83 L. Ed. 285 (Priority of jurisdiction assumed by state court); *United States v. Bank of New York*, 296 U. S. 463, 80 L. Ed. 331 (Jurisdiction assumed by state court in seizure of foreign property); *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154 (Priority of execution of state court judgment); *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749 (Priority of seizure under attachment).

Relying on these authorities we contend that the Federal Court has no jurisdiction over the controversy after jurisdiction assumed by the state court. The proper course is to stay or dismiss the action in the Federal Court and to set up the government's rights by intervention in the state action.

CONCLUSION.

The undisputed facts developed in this case clearly establish that by virtue of the defendant administrator's diligence in attempting to protect the rights of the beneficiaries of his decedent's estate,—he has succeeded in establishing a valid lien under the law of the State of Ohio to the extent of $18,500, which is prior in time not only to the lien of the United States provided for under the Internal Revenue Code, but prior to any assessment and demand made against Acri for his delinquent income taxes. The administrator's lien, as thus established, being prior in time, is therefore prior in right under the established law.

The Government is relying upon the opinion of Mr. Justice Minton in *United States v. Security Trust, supra*. Sufficeth to say that there was no appearance or briefs filed

on behalf of the defense in that action, the proceedings there before the Supreme Court were absolutely ex parte.

The lien under the Ohio law is absolute and not contingent upon being enforced within three years as provided by the California Statute. To apply the California law in the instant case would amount to a repeal and annulment, by judicial fiat, of the Ohio statutes relating to priorities of lien in attachment cases, contrary to the well established principles by the decisions of both the Supreme Courts of the United States and the State of Ohio. (See Conformity Rule 64, Rules of Civil Procedure, U. S. C. A. Title 28.)

In the words of the District Court Judge:

> "Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837 (RC 2715.19). *Illinois v. Campbell, supra.*
>
> The subsequent receipt of the assessment list by the Collector and the filing of an income tax lien by him accords the Government's lien only second place. 26 U. S. C. Section 3671.
>
> The case of *U. S. v. Security Trust and Savings Bank, supra,* relied upon the Government, dealt with a California statute giving no such effectivenness to attachment proceedings and liens as does the Ohio statute.
>
> The Ohio courts have characterized the attachment lien under Ohio law as an 'execution in advance,' *Rempe & Son v. Ravens,* 68 O. S. 113; *Green v. Coit,* 81 O. S. 280, and accord it equal standing with an execution lien. *Shorten v. Drake,* 38 O. S. 76. Thus they treat the attachment lien as perfected at the time the attachment is made.
>
> In the interest of orderly administration of justice in matters of concurrent jurisdiction, this Court should respect the state court's characterization of the attachment lien under Ohio law."

This case differs from the case of *United States v. Gilbert Associates,* 345 U. S. 361, where a specific federal tax lien was given priority over a general town lien for taxes in the distribution of an insolvent estate; or the *Security Trust* case, 340 U. S. 47, where no lien existed under the California law in an attachment of personal property; or the *New Britain* case, 347 U. S. 81, where the federal lien was perfected before the statutory lien of a city, the Supreme Court in the latter case basing its decision on the principle of "first in time, first in right."

Since justice must be equal to all, it would seem that the principle should be equally applied to the attachment lien here, perfected and lodged against specific property long before any steps have been taken by the government to assert its claim. The very language of Mr. Justice Minton in the *New Britain* case, *supra,* that "a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds," permits no other conclusion. He further observed that "Congress had this cardinal rule in mind when it enacted Section 3670." The Government had neither a debt nor a lien at the time the property was attached.

Without discussing the particularities of the collateral appeals here stategically combined, we confine ourselves strictly and solely to the issues and facts as developed in our case, the Acri case, and accordingly most earnestly urge under the authorities cited, that—

1. An attachment lien validly obtained under the Ohio statutes on specific property creates an absolute right in and to the attached property, as distinguished from a mere inchoate right, which cannot be displaced by subsequent liens.

2. Such lien, duly obtained before the Government has taken any steps to assert its lien for income taxes, will prevail over the Government lien under the rule "first in time is first in right."

3. An attachment of securities and money contained in a certain safe deposit box in a bank and the garnishment of the debtor's savings at such bank is a levy on specific property and gives the attaching creditor a specific lien which will prevail over a subsequent general lien.

4. Such levy made by the sheriff and due return made by him thereof places the attached property in *custodia legis* until the amount of the judgment rendered in the action shall have been satisfied.

5. When such proceeding has been commenced in a state court, subsequent creditors claiming liens must assert their rights in the state court action under the rule of preemption of jurisdiction, including the claim of the Government for priority of lien.

6. Federal courts will follow state statutes and decisions in matters of attachment and garnishment.

7. A statute cannot be construed to give subsequent liens priority over valid subsisting liens; otherwise the constitutional guarantees of due process and equal protection of the laws would be violated.

Respectfully submitted,

JOHN A. WILLO,
FRANCIS B. KAVANAGH,
ISRAEL FREEMAN,
Attorneys for the Administrator, Edward Oravitz, Respondent.

APPENDIX.

APPENDIX A (ADDITIONAL PORTIONS OF RECORD).

DEFENDANT'S EXHIBIT A.

Judgment of Common Pleas Court in the Case of Oravitz v. Acri.

No. 124,893.

THE COURT OF COMMON PLEAS

THE STATE OF OHIO, COUNTY OF MAHONING, SS.

EDWARD ORAVITZ,
administrator of the estate of John Oravec,
a.k.a. Oravitz, deceased,
(Plaintiff),

vs.

MICHAEL ACRI,
(Defendant).

JOURNAL ENTRY.

This day this cause came on for trial, and a jury being orally waived in open court by the plaintiff and the defendant, was submitted upon the petition of the plaintiff, the answer of the defendant, evidence and arguments of counsel.

On consideration thereof, and the Court being fully advised in the premises, finds on the issue joined for the plaintiff, and that by reason of the premises, the plaintiff is entitled to recover damages from the defendant.

The Court further finds that the assault by the defendant, upon the late John Oravec, which resulted in the death of John Oravec, as alleged in the petition, was without provocation and justification, and was wrongful, malicious and unlawful.

And thereupon, the Court assesses said damages at Eighteen Thousand Five Hundred ($18,500.00) Dollars.

IT IS THEREFORE CONSIDERED by the Court, that the plaintiff, Edward Oravitz, administrator of the estate of John Oravec, a.k.a. Oravitz, deceased, recover from the defendant, Michael Acri, the said sum of Eighteen Thousand Five Hundred ($18,500.00) Dollars, together with his costs.

THE COURT FURTHER FINDS that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Company of Youngstown, Ohio; that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947 and for the full payment and satisfaction of the judgment entered herein.

H. B. DOYLE,
Judge.

APPROVED BY:

JOHN A. WILLO,
Attorney for Plaintiff,

W. P. BARNUM,
Attorney for Defendant.

PLAINTIFF'S EXHIBIT 1.

Notice of Tax Lien Under Internal Revenue Laws.

No. 5619.

UNITED STATES INTERNAL REVENUE,
18TH DISTRICT OF OHIO.

November 21, 1947.

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer MICHAEL ACRI.

Residence or place of business—1341 Oak Street, Youngstown, Ohio.

NATURE OF TAX	YEAR OR TAXABLE PERIOD ENDED	DATE ASSESSMENT LIST RECEIVED	AMOUNT OF ASSESSMENT
Income	1944 Wash Addl.	79,551.80	79,551.80
		TOTAL	79,551.80

THOS. M. CAREY, *Collector*,
By: /s/ W. J. CHAMPION,
Assistant Collector.

CERTIFICATE OF OFFICER AUTHORIZED BY LAW
TO TAKE ACKNOWLEDGMENTS.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS:

Before me, this day personally appeared Thos. M. Carey, Collector, by W. J. Champion, to me well known, and well known by me to be the person described in and who executed the foregoing instrument as Assistant Collector of Internal Revenue for the 18th Collection District of Ohio; and he acknowledged before me that he executed the same as such Assistant Collector of Internal Revenue, and for the purpose herein expressed.

WITNESS my hand and official seal at Cleveland, in the County and State aforesaid, this 21 day of November, 1947.

/s/ ETHEL GAVAN,
Ethel Gavan, Notary Public,
My Commission expires 1-16-50.

To Recorder, Mahoning County,
Youngstown, Ohio.

[SEAL]

PLAINTIFF'S EXHIBIT 2.

Notice of Levy.

Served on: R. W. Dickey, Comptroller

Date Served: November 21, 1947

Time Served: 2.35 p. m.

Served by: /s/ Michael T. Walsh, Dep. Coll.
/s/ Arthur M. Mellott, Spec. Agent.

UNITED STATES OF AMERICA,
18TH COLLECTION DISTRICT,
STATE OF OHIO.

To The Dollar Savings & Trust Co.
At Youngstown, Ohio.

You are hereby notified that there is now due, owing, and unpaid from Michael Acri to the United States of America the sum of Seventy nine thousand five hundred fifty one & 80/100 dollars ($79,551.80) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Michael Acri and all sums of money owing from you to the said Michael Acri are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Seventy nine thousand five hundred fifty one and 80/100 dollars ($79,551.80) of the amount now owing from you to the said Michael Acri or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Cleveland, Ohio this 21 day of November, 1947.

THOS. M. CAREY, *Collector*,

By: /s/ W. J. CHAMPION,

Assistant Collector of Internal Revenue.

APPENDIX B (STATUTES).

Page's Ohio General Code:

SEC. 11819 (RC 2715.01). *Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

* * * * *

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; * * *

* * * * *

SEC. 11837 (RC 2715.19). *When property and garnishee bound.* An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, *from the time he is served with the written notice hereinbefore mentioned.* But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (Emphasis ours.)

California Code, Section 542 (a):

The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated. * * *

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the filing

with the recorder of an abstract of the judgment in the action.

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial

district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia. (26 U. S. C. 1946 ed., Sec. 3672.)